No. 9214

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,
Debtor,
UNION ROCK COMPANY, a corporation,
Subsidiary,
and
CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,
Subsidiary.

ALFRED E. ROGERS, L. L. ROGERS, LUCY H. ROGERS, HORACE V. GOODRICH, HENRY C. CHASE, JACK B. ROGERS, CARLTON M. ROGERS, HOWARD M. ROGERS, ROGERS CORPORATION, LTD., and CARLTON PROPERTIES, INC. LTD., owners and holders of shares of common stock of CONSOLIDATED ROCK PRODUCTS CO., and GEORGE A. ROGERS, INC. LTD., owner and holder of bonds of UNION ROCK COMPANY,
Appellants,

vs.

CONSOLIDATED ROCK PRODUCTS CO., F. B. BADGLEY, R. E. FRITH, T. FENTON KNIGHT and WALTER S. TAYLOR, composing UNION ROCK COMPANY BONDHOLDERS' PROTECTIVE COMMITTEE; WM. D. COURTWRIGHT, FRED L. DREHER, F. J. GAY, ALFRED GINOUX and GUY WITTER, composing CONSUMERS ROCK AND GRAVEL COMPANY, INC., BONDHOLDERS' PROTECTIVE COMMITTEE; EDWARD E. HATCH and LOUIS VAN GELDER, composing PREFERRED STOCKHOLDERS' COMMITTEE OF CONSOLIDATED ROCK PRODUCTS CO. and E. BLOIS DUBOIS,
Appellees.

APPELLANTS' REPLY BRIEF.

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Cases.

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APPELLANTS' REPLY BRIEF.

There are several instances in which misunderstanding may arise from factual inaccuracies in appellees' brief.

On page two, appellees state that appellants have referred to the transcript in the DuBois appeal to set forth

some of the matters not contained in the transcript herein. Except for a reference to the petition for reorganization, appellants have not done so. Appellees' reliance upon that transcript is patently an attempt to incorporate, as support for the District Court's order, grounds which were not specified in the motion upon which the order was based.

On page three appellees say that appellants' statement of facts is not complete. Thereafter they purport to set out the complete series of steps taken in both this and the DuBois appeal but in so doing make no reference to the stipulation signed by all parties permitting the withdrawal and renewal of appellants' proposed modifications or to the order thereon made by the court. [App. Op. Br. p. 9; Tr. p. 12.]

The proceedings in connection with the proposal of modifications would have been fully outlined by appellees had they listed them as follows:

August 26, 1938	Appellants herein, Rogers, *et al.*, file their proposal for changes and modifications. [Tr. p. 11.]
September, 1938	Oral request made by attorneys for Debtor and Union and Consumers committees for withdrawal of proposal. [Tr. p. 12.] [Transcript does not show date.]
September 7, 1938	Stipulation signed by *all* parties to this appeal including the solicitor for committee of Preferred Stockholders, Mr. Stanley Arndt (author of appellees' brief). Stipulation reads:

"It is stipulated that an order be made herein authorizing the withdrawal of said Proposal for Changes and Modification in Plan of Reorganization, without prejudice to a renewal thereof after the Order for Confirmation shall have been signed, and *that after such Order for Confirmation shall have been signed herein, such proposal may be renewed.*" [Tr. p. 12.] (Italics ours.)

September 8, 1938 Order entered permitting withdrawal of proposal "without prejudice to renew the same after an order has been made herein confirming the plan of reorganization, and that after an order has been made herein confirming the plan of reorganization as proposed, *said proponents shall be and are hereby authorized to renew their said proposal.*" [Tr. pp. 12-13.] (Italics ours.)

September 8, 1938 Order entered confirming plan of reorganization. [Tr. p. 12.]

September 17, 1938 Appellants' Proposal for Modification filed second time. [Tr. p. 13.]

Analysis of Appellees' Brief.

Appellees contend:

(1) That appellants have not intervened, therefore have no appealable interest;

(2) That the District Court has no power

(a) To modify the plan pending appeal,

(b) To modify the plan after the appeal;

(3) That appellants are guilty of laches;

(4) That even if the proposed modifications could be made, appellees would not accept them.

Various arguments are made in connection with these contentions, some of them repetitious, but in the main the above is a complete outline of appellees' position and appellants will reply in that order.

I.

Reply to Appellees' Contention That Appellants Have Not Intervened and Are Not Parties Entitled to Appeal.

1. An Order of Court Authorized the Filing of Appellants' Proposed Modifications.

1. Appellees contend that appellants are not in court, having failed to secure permission to intervene. (App. Br. pp. 13, 17-23.) So great is appellees' enthusiasm for this technical point that they have failed to consult the transcript to ascertain whether their contention is supported by the facts. They therefore fail to quote the stipulation which they all signed *expressly* consenting to appellants' appearance in the case and the District Court's order *expressly authorizing* appellants to file their proposed modifications. Both of these are set forth in appellants' opening brief, and surely must have been noticed by appellees, but nowhere in the 51 pages of saturnine criticism which constitutes their brief is any mention made of them. We repeat them here:

> *Stipulation,* September 7, 1939, signed by all the appellees:
>
> "It is stipulated that an order be made herein authorizing the withdrawal of said Proposal for Changes and Modifications in Plan of Reorganization, without prejudice to a renewal thereof after the Order for Confirmation shall have been signed, and that after such Order for Confirmation shall have been signed herein, such proposal may be renewed."

Order, September 8, 1939, signed by Harry A. Hollzer, District Judge:

> "It is ordered that said Proposal be withdrawn, without prejudice to renew the same after an order has been made herein confirming the plan of reorganization, and that after an order has been made herein confirming the plan of reorganization as proposed, *said proponents shall be and are hereby authorized to renew their said proposal."*

Assuming that permission is required by the statute, could any more permission be obtained than by this stipulation and order? Is anything clearer than the order of the District Judge that *"said proponents shall be and are hereby authorized to renew their said proposal"*? Perhaps appellees will say that the magic word "intervene" was not uttered by the court, but this is no more than the name for the act of obtaining authority to become a party and the act of obtaining permission is liberally construed by the courts. Thus, while ordinarily an order of court should be obtained, it is held that entry of an order is waived where the suit proceeds without objection, as it did here.

Perry v. Godbe, 82 Fed. 141.

While the fact that all the parties stipulated to the order authorizing appellants' appearance made unnecessary a formal "petition", it should be noted that courts have inherent power to bring before it persons who are

not original parties whenever this is deemed necessary to the complete administration of justice.

> *Serr v. Biwabick Concrete Co.* (Minn.), 278 N. W. 355, 117 A. L. R. 1009.

See also:

> 20 *R. C. L.* 694.

Intervention is defined as:

> "The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings."
>
> *2 Bouvier's Law Dictionary,* 1675.

This is exactly what appellants have done so far as the proposed modifications are concerned. Appellants are in the position of parties who have been granted express leave of court (as well as the express leave of all other parties) to institute these very proceedings. Appellants' intervention is further strengthened by the District Court's recommendation that an appeal be taken to ascertain the extent of his jurisdiction after the determination of the DuBois appeal. [Tr. p. 26.]

The immediate and complete answer to appellees' contention is, therefore, that appellants have taken every step necessary to assure their standing in court.

II.

Reply to Appellees' Arguments Concerning the District Court's Jurisdiction Pending and After Appeal.

1. Jurisdiction to Modify During Appeal Is Not Necessarily Involved;

2. Jurisdiction to Modify After Appeal Is Essential to the District Court's Control;

3. Any Judgment or Decree May Be Modified by Consent.

1. Appellees seem to mistake appellants' main contention, which is the error of the District Court in *dismissing* the proposed modifications. Thus appellants have stated, at the conclusion of appellants' brief:

> "Appellants do not complain because the District Court failed immediately to hear and pass upon the merits on the date of the hearing, even though appellants believe that the court had jurisdiction at that time to make such changes and modifications as it deemed proper. What appellants urge as the error of the District Court is the *dismissal* of appellants' proposal, foreclosing them once and for all from urging their grounds of modification even after the DuBois appeal has been decided and the trial court's jurisdiction restored."

This is in conformity with the statement of the points relied on and the assignments of error, both of which stress the *dismissal*—the complete cutting off of appellants from a hearing on the proposed modifications. This being so, appellants have merely noted (App. Op. Br. p. 20),

that they believe the trial court had jurisdiction to hear the modifications even during appeal, had the court so desired. This, however, becomes moot as soon as the DuBois appeal is determined because there is then no "pending appeal."

In the District Court appellants suggested that the proposed modifications be heard after the DuBois appeal. While this suggestion could not deprive the court of jurisdiction appellants do not complain of the court's failure to hear the modifications at that time. The point of appellants' argument is that if the court had jurisdiction to hear the modifications during appeal, *a fortiori* it had jurisdiction after appeal.

2. For the most part, appellees' argument (Appellees' Brief, pp. 47-49) consists in a misplaced *reductio ad absurdum* in which the sole absurdity is found in the argument itself. Thus appellees argue that if the District Court may modify the plan after affirmance on appeal, no plan could ever be consummated. They forget that the statute expressly permits such modification after confirmation and that the affirmance of the order adds nothing to its stature. (App. Op. Br. p. 23.) In other words, the plan is "confirmed" by the trial court and after appeal it is still "confirmed" and nothing more.

Reason supports the need for the right to modify at any time. The possibilities suggested in appellants' opening brief are only a few of the many which are called to the mind. Whenever the equities of the situation are such as to call for modification, and consent can be obtained thereto, the court of necessity must have the right to make such modifications. A plan of reorganization is, after all, only a plan—problems may, and frequently do,

appear which were never envisioned by the draftsmen and when such appear, modification is required.

Appellees make the further serious error of contending that a decree of confirmation is "binding" willy-nilly, without regard to the steps taken to consummate it. Thus they set forth (Appellees' Brief, p. 42) Section 77B (9) and Section 224 of the Chandler Act, both of which provide than on confirmation of the plan its provisions shall be binding upon all creditors and stockholders, etc. But, we ask, what happens to reorganizations where the plans are never consummated even though confirmed? Is a stockholder bound by a confirmation of a plan never consummated? We know of such situations, and in each of them the order of consummation was vacated and the reorganization started all over again. *Confirmation is nothing without consummation.* Bondholders and stockholders may consent, the court may confirm, and the committees may seek to carry out the plan but no ultimate conclusion is reached until the reorganized corporation functions under the final decree, after consummation has been had. The argument that under the Corporate Securities Act securities cannot be issued until a policy of title insurance is issued and that no policy can be issued if a plan can be modified is absurd. Section 77B has allowed modification after confirmation ever since its enactment in 1933 and, so far as we know, title insurance companies have been writing policies all that time. Every permit issued by the Commissioner of Corporations contains this clause:

> "The securities herein permitted to be sold shall not be executed and delivered until the plan of reorganization set forth in the application shall have been confirmed by order of the District Court of the

> United States, for the Southern District of California, Central Division, in the proceedings now pending before said Court."

thus placing the burden where it belongs—on the District Court. During all this time title insurance policies have contained exceptions in favor of the issuer in the event 77B is declared unconstitutional but without preventing the issuance of securities or the confirmation of plans. So long as their premiums are paid, title insurance companies will continue to write policies.

Appellees contend that an order confirming a plan is not interlocutory but cite no authority holding that it is not. In enacting Section 77B Congress did not specifically term the order of confirmation as "interlocutory" but in at least one similar reorganization statute it has. This is Section 83 of the Bankruptcy Act dealing with municipal debt readjustment. Here the statute provides:

> "e. At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon, and shall enter an *interlocutory* decree confirming the plan if satisfied that (1) it is fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors; (2) complies with the provisions of this chapter; (3) has been accepted and approved as required by the provisions of subdivision (d) of this section; (4) all amounts to be paid by the petitioner for services or expenses incident to the composition have been fully disclosed

> and are reasonable; (5) the offer of the plan and its acceptance are in good faith; and (6) the petitioner is authorized by law, to take all action necessary to be taken by it to carry out the plan. If not so satisfied, the judge shall enter an order dismissing the proceeding." (Italics ours.)

The decree termed "interlocutory" in Section 83 is identical with the decree of confirmation in 77B and a comparison shows that the same objects and purposes are accomplished by each.

So far as consent of the appellate court is concerned, appellants do not concede that the statute requires it. But even if it does, that is a question to be disposed of *after* the DuBois appeal has been decided. It was not necessary to seek the Circuit Court of Appeals' consent when appellants proposed these modifications for there was then no appeal. If it is deemed essential that such consent be obtained *after* the appeal is concluded, it will be sought then.

3. In their defense of that which they term "the appellate practice in force in all Anglo-Saxon jurisdictions" appellees have forgotten one of the fundamental rules of all jurisdictions, which is well stated in the following quotation from 3 American Jurisprudence 731:

> "The parties to the litigation, legally competent to act and sue for themselves alone, may disregard in whole or in part the directions of the reviewing court, even though that court may specifically direct what

> proceedings are to be taken in the lower court to which the case is remanded or the character of the judgment to be entered, may settle the litigation in any manner they may agree to, and may ask the lower court to enter as its judgment the agreements they make."

77B (f), in providing for modification of the plan after confirmation, provides a method for obtaining the consent of creditors and stockholders by giving them opportunity to withdraw. If sufficient numbers withdraw their acceptances, consent has not been obtained and the modifications are not made. But if the creditors and stockholders signify assent by failure to withdraw, the modifications become operative *and thus the plan has been modified by the agreement of the parties which they may always make regardless of the decree of the appellate court.*

By this appeal appellants are striving to maintain their right (1) to propose modifications, (2) to have the District Judge pass on their merits, *i.e.,* whether they shall be presented to the creditors and stockholders, and (3) have the stockholders and creditors given an opportunity to accept or reject them. When the modifications have been made they will have been *voluntary,* not coerced, as appellees seem to infer. Thus the problem of jurisdiction in the District Court after appeal is not so broad as appellees contend. The foundations of jurisprudence will not crumble by a reversal of the District Court's order dismissing appellants' proposals. Such a reversal will merely permit an orderly procedure for determination of the fairness of the proposals and whether they will be accepted by the other creditors and stockholders.

III.

Reply to Appellees' Argument That Appellants Have Been Guilty of Laches.

This most surprising contention is utterly without foundation. The motion to dismiss, prepared by counsel for the Preferred Stockholders' Committee, was made on the following grounds:

> "Said motion will be based upon the ground that the Court has no jurisdiction in the matter in that the plan of reorganization which it is proposed to change or modify is now on appeal, the term in which said plan of reorganization was approved has expired, the appeal has been perfected, briefs have been filed by the parties herein, and the above entitled Court has no jurisdiction in the matter." [Tr. p. 21.]

Laches is a defense which must be pleaded and cannot be raised for the first time on appeal.

> *Ferryboatmen's Union of California v. Northwestern Pac. R. Co.,* 84 F. (2d) 773 (C. C. A. 9th);
>
> *American Merchant Marine Ins. Co. v. Tremaine,* 269 Fed. 376 (C. C. A. 9th).

Nowhere in the motion is any attempt made to specify laches as a ground, nowhere in the order, prepared by appellees, and *which contains findings of fact,* is there any mention of laches or lack of diligence. There is no basis whatever for this contention, made for the first time on appeal; indeed, the record throughout the proceedings (see Appellees' Brief, pp. 3, 4, 12) shows the Rogers diligent in participation in all steps taken. The only distinction is that the Rogers group were then represented by Alfred E. Rogers, Esq., and they are now represented by present counsel.

The proposed modifications were filed within nine days after entry of the order of confirmation [Tr. p. 13], a fact which indicates speed and not laches.

IV.

Reply to Appellees' Argument That They Will Not Accept the Proposed Modifications.

This contention has no place in this appeal, which has for its sole concern the question of jurisdiction. Appellees surely cannot speak for each and all of the individual bondholders and stockholders who have filed acceptances in these proceedings. If the trial court, after a hearing, decides that one or all of appellants' proposals should be submitted to the creditors and stockholders who have heretofore signified their assent, it will be time enough for appellees to make their recommendations.

Conclusion.

Appellees' position is ostensibly one of solicitude for the rights of DuBois and his appeal, a viewpoint apparently not shared by DuBois, who has not joined in appellees' brief, although he is named and was served as an appellee.

Appellants respectfully submit that the statute gives them a right to be heard on the merits in the District Court, before or after appeal, and accordingly, that the order dismissing their proposed modifications should be reversed.

Respectfully submitted,

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